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"I Had a Lakehouse in Tahoe": The Legal Ramifications of California Tapping Lake Tahoe and how it Affects Homeowners

Gregory Stratz

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**“I HAD A LAKE HOUSE IN TAHOE”: THE
LEGAL RAMIFICATIONS OF CALIFORNIA
“TAPPING” LAKE TAHOE AND HOW IT
AFFECTS HOMEOWNERS**

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I. INTRODUCTION

Between the years of 2011 and 2019, California went through one of the worst periods of drought in the history of the state.¹ In response, California Governor, Jerry Brown created a Drought Task Force to assess the States dry conditions and provide methods to mitigate and respond to future droughts.² Most of the response involved mandatory water conservation rules, which have been enacted into law permanently despite the end of the drought emergency.³ These new conservation rules were created “[i]n preparation for the next drought and [the] changing environment.”⁴

Along with the Governor, many scientists believe that global warming has had an effect on the drought conditions that are relatively common in California.⁵ Still, these new conservation rules already faced opposition and could even face legal challenges in the near future.⁶ Should these regulations

1. Thomas Sumner, *California Drought Worst in at Least 1,200 Years*, SCI. NEWS (Dec. 6, 2014, 8:00 AM), <https://www.sciencenews.org/article/california-drought-worst-least-1200-years> [<https://perma.cc/V9EK-GYV8>] (restating that “[t]he ongoing California drought is the driest period in the state’s history since Charlemagne ruled the Holy Roman Empire . . .” from a study in which climate scientists studied climate data found inside the bark of trees); see *Drought in California*, DROUGHT.GOV, <https://www.drought.gov/drought/states/california> (last visited Oct. 22, 2019) [<https://perma.cc/4M37-E4E9>].

2. CAL. DROUGHT, <http://www.drought.ca.gov> [<https://perma.cc/BHB5-TZBN>] (last visited Aug. 8, 2019); *California Drought and Pine Mountain Lake*, PINE MOUNTAIN LAKE ASS’N, <http://www.pinemountainlake.com/california-drought-and-pine-mountain-lake/> (last visited Oct. 8, 2019) [<https://perma.cc/5XF6-6A5M>].

3. Paul Rogers, *Drought or No Drought: Jerry Brown Sets Permanent Water Conservation Rules for Californians*, MERCURY NEWS, (May 31, 2018, 3:30 PM), <https://www.mercurynews.com/2018/05/31/california-drought-jerry-brown-sets-permanent-water-conservation-rules-with-new-laws/> [<https://perma.cc/P7VG-842D>].

4. *Id.* (statement of Governor Brown) (“In preparation for the next drought and our changing environment, we must use our precious resources wisely. We have efficiency goals for energy and cars—and now we have them for water.”).

5. Justin Gillis, *California Drought is Made Worse by Global Warming, Scientists Say*, N.Y. TIMES (Aug. 20, 2015), <https://www.nytimes.com/2015/08/21/science/climate-change-intensifies-california-drought-scientists-say.html> [<https://perma.cc/W7E8-QUFR>] (“Global warming . . . has most likely intensified the [2011–2015] drought in California by 15 to 20 percent . . . [and] that future dry spells in the state are almost certain to be worse . . . as the world continues to heat up.”).

6. See Robert Ferris, *California Drought: New Water Rules May Not Work*, CNBC (May 8, 2015, 12:17 PM), <https://www.cnbc.com/2015/05/08/california-drought-new-water-rules-may-not-work.html> [<https://perma.cc/NU4H-QEM2>] (stating that Michael Wara, a professor of environmental

be withdrawn, or should another drought hit California that depletes California's reserve water supply regardless of the regulations, the state will need to find more water somewhere. Perhaps a solution would be to divert additional water from Lake Tahoe, conveniently located within California's own borders and holding enough water to cover the entire state in fourteen inches of water.⁷ Such a diversion could, in turn, lower water levels on the lake, reducing the value of home prices there.⁸ More specifically, such a diversion and water reduction in Lake Tahoe would significantly reduce the value of homes within a series of man-made canals connected to the waters of Lake Tahoe called the Tahoe Keys.⁹

The purpose of this Comment is to explore if any additional diversion of water from Lake Tahoe by the State of California would lead to a viable takings claim by the homeowners of property within the Tahoe Keys. Part II provides a historical background about Lake Tahoe, including previous attempts—some successful, some unsuccessful—to allocate water from Lake Tahoe to various places within California. Part III explains the economic effect that a water element has on a property value. More specifically, it explains the economic effect that a water element has around Lake Tahoe and establishes the probable drop in price of the homes within the Tahoe Keys should the water in the Tahoe Keys disappear. Part IV establishes the rights to the water in Lake Tahoe of both the state of California and the homeowners within the Tahoe Keys. Finally, Part V explores takings jurisprudence and applies it to both a scenario in which the water level within the Tahoe Keys is lowered due to California's diversion of the water and a scenario in which the water is completely taken from the Tahoe Keys.

law at Stanford University, doubts the enforceability of the new rules without a complete overhaul of California's legal structure for allocating water); *Could California Drought Restrictions Slash Water Rights? Some Think So*, CBS NEWS (Feb. 21, 2018, 12:02 PM), <https://www.cbsnews.com/news/could-california-drought-restrictions-slash-water-rights-some-think-so/> [<https://perma.cc/K9GQ-8H86>] ("Water officials expect neighbors to be responsible for detecting and reporting most of the wasteful water use, and they have no plans to add more enforcement officers . . .").

7. See *infra* note 27 and accompanying text.

8. David Wyman & Elaine Worzala, *Dockin' USA—A Spatial Hedonic Valuation of Waterfront Property*, 25 J. HOUS. RES. 65, 76 (2016).

9. *Id.* at 66; see also Rick Chandler, *History of Tahoe Keys*, TAHOE DAILY TRIB. (Dec. 19, 2001), <https://www.tahodailytribune.com/news/history-of-tahoe-keys/> [<https://perma.cc/R3JU-R7F8>].

II. TAHOE, THE MOST BEAUTIFUL WATER TAP THE WORLD HAS EVER
KNOWN

*Down through the transparency of these great depths, the water was not merely transparent, but dazzlingly, brilliantly so. All objects seen through it had a bright, strong vividness, not only of outline, but of every minute detail . . .*¹⁰

— Mark Twain (describing the waters of Lake Tahoe)

Known as “the jewel” of the Sierra Nevada,¹¹ Lake Tahoe was discovered in 1844 by Lt. John C. Frémont.¹² This designation as the jewel is absolutely deserved. The clarity of the water of Lake Tahoe is world renowned and considered a natural wonder, allowing lake goers to see down to 100 feet below the surface.¹³ Lake Tahoe is also incredibly large. Measuring at twenty-two miles long and twelve miles wide, Lake Tahoe has about seventy-two miles of shoreline surrounding its beautiful, crystal clear waters.¹⁴ This shoreline has understandably been developed on by individual homeowners in order to reap the benefits of having lakefront property on such a famously gorgeous lake. In fact, some real estate projects have been developed in order to maximize the amount of people who can say that they have a lakefront home on Lake Tahoe.¹⁵

10. MARK TWAIN, ROUGHING IT 175 (1872).

11. See, e.g., R. Forrest Hopson, *Travels in Geology: Lake Tahoe Jewel of the Sierra Nevada*, EARTH MAG. (Aug. 6, 2012), <https://www.earthmagazine.org/article/travels-geology-lake-tahoe-jewel-sierra-nevada> [<https://perma.cc/Q363-VUM5>]; Eric Mack, *Lake Tahoe's No Good, Very Bad Year*, FORBES (Jul. 30, 2016), <https://www.forbes.com/sites/ericmack/2016/07/30/lake-tahoes-no-good-very-bad-year/#10eca37636f4> [<https://perma.cc/G6ND-8EGJ>].

12. Mark McLaughlin, *The Lake Tahoe Water War*, 6 J. SIERRA NEV. HIST. & BIOGRAPHY: SNOWY RANGE REFLECTIONS (2015), <https://www.sierracollege.edu/ejournals/jsnhb/v6n2/waterwar.html> [<https://perma.cc/EKY4-8JGL>].

13. *Compare Water Quality Threshold*, KEEP TAHOE BLUE, <https://www.keeptahoeblue.org/protect/water> [<https://perma.cc/MB5M-HKFJ>] (last visited Oct. 6, 2019) (stating that the deepest Secchi depth, the process of dropping a white disk into the water and measuring how deep it can be seen from the surface of Lake Tahoe was 100 feet in 1968 and is currently at about 70 feet), with Patrick L. Brezonik, Leif G. Olmanson, Marvin E. Bauer, & Steven M. Kloiber, *Measuring Water Clarity and Quality in Minnesota Lakes and Rivers: A Census-Based Approach Using Remote-Sensing Techniques*, CURA REPORTER, Summer 2007, at 3, 11, http://web.pdx.edu/~nauna/resources/21-waterBrezonik_et_al-Measuring_Water_Clarity.pdf [<https://perma.cc/XC59-A569>] (stating via chart that average Secchi depth of the clearest lake in Minnesota was a little under four meters, or twelve feet).

14. *Lake Tahoe Facts*, TAHOE WEEKLY, <https://thetahoeweekly.com/lake-tahoe-facts/> [<https://perma.cc/A87H-NFNM>] (last visited Oct. 6, 2019).

15. See Chandler, *supra* note 9.

The prime example of such a project is the Tahoe Keys development project located in South Tahoe, California.¹⁶

The Tahoe Keys are a development of "dockcommunities" on which "[t]here are 1,581 lots on approximately 500 acres . . . with 12 miles of shoreline among its islands, bays and lagoons."¹⁷ Development of these dockcommunities occurred during the late 1950's and through the 1960's¹⁸ by dredging out the Truckee Marsh and molded by using the extra, dredged up soil from the marsh to form the different islands.¹⁹ This process of dredging allowed for the developers of the Tahoe Keys to take a smaller plot of land along the lake and turn it into more than a thousand lots to sell to individuals who want a home on Lake Tahoe with access to the water.²⁰

This development strategy also came with negative consequences for the new waterfront homeowners. One problem in particular is that as water levels of Lake Tahoe drop, the access depth of the Tahoe Keys drops as well.²¹ Additionally, due to the shallow nature of the dredged canals, any drop in water level around the natural rim of Lake Tahoe leads to a water level drop in the canals of the Tahoe Keys, making the channel unnavigable to most boats.²² Such water level drops significantly affect the expected use of and access to Lake Tahoe of the homeowners within the Tahoe Keys even though the drops in water levels are usually temporary.²³

Another aspect of Lake Tahoe that has been appealing to entrepreneurs is Lake Tahoe's vastness. Lake Tahoe has 192 square miles of surface area²⁴ and

16. *See id.* A dockcommunity is a type of subdivision of properties that are developed and sold on a mass scale, similar to condominiums or another type of housing association but on the water with dock space available for each property.

17. *See id.*

18. Tahoe Keys Prop. Owners' Ass'n v. State Water Res. Control Bd., 28 Cal. Rptr. 2d 734, 737 (Ct. App. 1994).

19. Chandler, *supra* note 9.

20. *Id.*

21. *See* Griffin Rogers, *Marina: Low Water Levels Could Lead to Dredging*, TAHOE DAILY TRIB. (Feb. 5, 2014), <https://www.tahodailytribune.com/news/local/marina-low-water-levels-could-lead-to-dredging/> [<https://perma.cc/Y7FT-RRED>].

22. *See id.* ("The channel is navigable now, but only if a boat requires three and a half feet of water or less to float . . .").

23. *See* *Lake Tahoe Water Level*, LAKES ONLINE, <http://tahoe.uslakes.info/Level.asp> [<https://perma.cc/QVW6-XG7D>] (last visited Oct. 6, 2019) (demonstrating via chart the changing water levels of Lake Tahoe through 2017 and 2018).

24. *Lake Tahoe Facts*, *supra* note 14.

the average depth of this 122,000 acres of water surface on Lake Tahoe is approximately 1,000 feet.²⁵ This makes Lake Tahoe the second deepest lake in the United States.²⁶ In fact, Lake Tahoe holds about thirty-seven trillion gallons of water which is “enough water to cover a flat surface, the size of California with 14 inches of water.”²⁷

Given the incredible water volume of Lake Tahoe in a sometimes drought ravaged area, it is easy to understand why, within twenty years of its discovery (by John C. Fremont), parties were already “scheming how to exploit the waters of this spectacular alpine lake.”²⁸ Most notable of these schemes—for the purposes of this Comment at least—were plans to transport water from Lake Tahoe to Placer County, California and San Francisco, California.²⁹ The most ambitious of which involved feeding two six-foot conduits “by a diversion dam on the river, capable of carrying 200,000,000 gallons of water daily” to San Francisco.³⁰ This plan was actually granted, and the Truckee River Dam was built at the lake’s outlet in 1870.³¹ The engineer who built the dam “was granted the right to appropriate . . . about 320 million gallons, a day.”³² However, this plan “proved too costly and was abandoned.”³³ Eventually, an electric company purchased the dam, outlet works, and the power plants along the river with an agreement to continue to “maintain an average [water] flow in the river”

25. U.S. Gen. Accounting Office, GAO/CED-82-85, *Water Diverted from Lake Tahoe Has Been Within Authorized Levels*, at 2 (1982).

26. Nestle J. Frobish, *‘Tahoe to Tap’ Could Ease California’s Water Woes*, CALIFORNIA WATERBLOG (Apr. 1, 2014, 12:07 AM), <https://californiawaterblog.com/2014/04/01/tahoe-to-tap-could-ease-californias-water-woes/> [<https://perma.cc/JJX7-T9MH>].

27. *Frequently Asked Questions about Lake Tahoe and the Basin*, U.S. DEP’T OF AGRIC.: FOREST SERV., <https://www.fs.usda.gov/main/lfbmu/about-forest/about-area> [<https://perma.cc/R3CJ-2M3D>] (last visited Oct. 6, 2019).

28. See McLaughlin, *supra* note 12.

29. See *id.*; see also *Driving Directions from Placer County, CA to Lake Tahoe, CA*, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/Q9XG-YD68>] (follow “Directions” hyperlink; then search starting point field for “Placer County, California” and search destination field for “Lake Tahoe”) (showing that Placer County is about a ninety mile trek from Lake Tahoe); see also *Driving Directions from San Francisco, CA to Lake Tahoe, CA*, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/ABN8-TBC3>] (follow “Directions” hyperlink; then search starting point field for “San Francisco, California” and search destination field for “Lake Tahoe”) (showing that Lake Tahoe is about 194 miles from San Francisco).

30. EDWARD B. SCOTT, *THE SAGA OF LAKE TAHOE* 27 (1st ed. 1957).

31. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 2.

32. *Id.*

33. *Id.*

and to maintain "a sufficient supply of water for power generation in California" down-stream.³⁴ In 1915, through eminent domain, the United States government gained possession and the right to control the flow from the Truckee Dam and "entered into a contract with the Truckee–Carson Irrigation District granting the district the right to operate" and maintain the project.³⁵

It is important to mention that to date, the diverted flow through the Truckee Dam only allows flow from a six-foot reservoir on the edge of Lake Tahoe and does not actually allow for access to divert water from the entirety of the lake.³⁶ Even still, the water rights involved with the adjudication of diversions from the Truckee Dam has been marred in litigation.³⁷ In fact, the "Truckee River has been called one of the most litigated waterways in the West."³⁸

Despite the constant litigation over this water source, it took until 1990 for Congress to enact legislation that allowed for the negotiation of the Truckee River Operation Agreement³⁹ and "[i]n the true spirit of government it only took 27 years" to reach an agreement.⁴⁰ That agreement, the Truckee River Operation Agreement, was created to—hopefully—end the need for litigation to settle the conflicting interests of parties that have a legal right to the water diverted through the Truckee Dam, including California and Nevada municipalities, various utility companies, conservation groups, and the Pyramid Lake Paiute Tribe of Indians.⁴¹ Ironically, the deal was officially "signed in 2008 but litigation at several levels held up any implementation until . . . August 2015."⁴² The Truckee River Operation Agreement was finally

34. *Id.*

35. *Id.* at 2–3.

36. *See id.* at 3.

37. *See, e.g., Nevada v. United States*, 463 U.S. 110, 113 (1983); *see also United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1309 (9th Cir. 1990); *Carson-Truckee Water Conservatory Dist. v. Clark*, 741 F.2d 257, 260 (9th Cir. 1984).

38. Julia Ritchey, *Newly Inked Truckee River Agreement Already Paying Off*, KUNR (Jan. 6, 2016), <http://www.kunr.org/post/newly-inked-truckee-river-agreement-already-paying#stream/0> [<https://perma.cc/64XB-R8G6>].

39. U.S. Dep't of the Interior Bureau of Reclamation, *Truckee River Operating Agreement*, at R-1 (2008), https://www.usbr.gov/mp/troa/final/troa_final_09-08_full.pdf [<https://perma.cc/28AG-TYFL>].

40. Seth A. Richardson, *Truckee River Water Deal Implemented After 27 Years in the Works*, RENO GAZETTE J. (Jan. 5, 2016), <https://www.rgj.com/story/tech/environment/2016/01/05/truckee-river-water-deal-implemented-after-27-years-works/78322662/> [<https://perma.cc/5UPR-LVAG>] (quoting Sparks Mayor Geno Martini).

41. *See Ritchey, supra* note 38.

42. *See Richardson, supra* note 40.

implemented in December of 2015,⁴³ and benefits of the deal have already been seen by the various parties involved.⁴⁴ Most notably, municipalities have now been able to better store water in their reservoirs in order to prepare for the frequent droughts of the area.⁴⁵

Even before the Truckee River Operation Agreement, diverting additional water from Lake Tahoe in order to mitigate the effects of a severe drought seemed to many municipalities to be “politically off limits [as a] new water supply.”⁴⁶ Yet, some of the more severe droughts continuously tempt citizens of municipalities to dream of diverting additional water from Lake Tahoe through the Truckee Dam to ease their water shortage.⁴⁷ One such recent pipe-dream plan, dubbed “Tahoe to Tap,” would expand the area of the lake that is divertible from the six-foot reservoir at the entrance of the Truckee Dam to the entire lake!⁴⁸

Such dreams of accessing the great waters of Lake Tahoe are clearly a nightmare to those with lakefront property. Not only will the water levels of Lake Tahoe be affected by the new water diversions, but such additional diversions will most likely be prompted by drought-like conditions throughout the region that have already negatively affected the water level of the lake.⁴⁹ Such a combination will only exacerbate the lack of access to the lake from their homes that homeowners in the Tahoe Keys are experiencing.⁵⁰

Finally, to make matters worse for the homeowners in the Tahoe Keys, the lack of access to the lake puts into question the exact value of the homes within the Tahoe Keys. A large portion of the real estate property value within this development is based upon the fact that these properties are “lakefront properties.”⁵¹ As will be explained in Part III, the lack of such lake access—

43. *See id.*

44. *See Ritchey, supra* note 38.

45. *See id.*

46. *See Frobish, supra* note 26 (Michael O’Shaughnessy, a veteran of California’s water wars stating: “Never in my wildest imagination would I have considered this noble sheet of blue water for expanding California’s surface water storage . . .”).

47. *See id.*

48. *See id.* (stating that a study done by a civil engineer at the Reber Foundation of San Francisco has provided a breakthrough in “Plexiglas technology and hydrologic engineering that would enable construction of a transparent cap covering all 193 square miles of the lake and suspended about 120 feet below its surface,” therefore allowing for diversion).

49. Gillis, *supra* note 5.

50. Frobish, *supra* note 26; Rogers, *supra* note 21.

51. *See infra* Part III.

and even, if the situation gets dire enough, the lack of water by the property at all—could completely decimate the value of the homes.⁵² In turn, homeowners are left in the Tahoe Keys without either a lake home to call their own or any buyer willing to pay them reasonable return on investment value for their homes due to the change in status from lakefront property to, simply, property.

III. NO WATER, MO' PROBLEMS (FOR REAL ESTATE PRICES AND HOMEOWNERS)

There are three things that matter in property: location, location, location.

— Lord Harold Samuel (doubtfully)⁵³

Anyone who has ever thought about buying or selling real estate has heard some iteration of the quotation above. This age-old adage—that location is the most important element in evaluating real estate—remains true, even though it can be a massive over-simplification of the evaluation process.⁵⁴ Location is so important to real estate values due to the various factors that location typically contributes to a property's value, including school zone, convenient access to commercial districts and entertainment, safety of the neighborhood, aesthetic views, and access to water.⁵⁵ These factors, along with others, are often used in hedonic pricing models to try and determine the value of each external factor.⁵⁶ In turn, real-estate agents will take such factors into account when pricing homes and placing those houses on the market.⁵⁷ Section A will

52. *See infra* Part III.

53. William Safire, *Location, Location, Location*, N.Y. TIMES MAG., June 26, 2009, at MM14, <https://www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html> [<https://perma.cc/6Y4K-BJW7>] (stating that while this quote is often attributed to Lord Samuel, it is actually quite doubtful that this quote was first coined by him).

54. *See, e.g.*, Wyman & Worzala, *supra* note 8, at 65; *see also* Russ Kashian & Matthew Winden, *An Assessment of Lakefront Property Values Based on a Decline in Water Levels: It's Impact on Value and Taxes* (2015), <https://rkld.org/wp-content/uploads/2015/05/Kashian-UW-W-Economic-Report-3-29-15.pdf> [<https://perma.cc/5DVY-K2P7>].

55. Brendon DeSimone, *Why Location Matters in Real Estate*, FOX BUS. (Oct. 22, 2013), <https://www.foxbusiness.com/features/why-location-matters-in-real-estate> [<https://perma.cc/873V-HNJE>].

56. *Hedonic Pricing*, INVESTOPEDIA, <https://www.investopedia.com/terms/h/hedonicpricing.asp> [<https://perma.cc/8GJ3-MSWB>] (last updated Apr. 26, 2019).

57. *See infra* Table 1 (real estate prices found in the area are a good indicator as to how real estate agents take the waterfront element in their pricing process).

explain the effects of water levels on real-estate prices and the hedonic models used to measure these effects. Section B will explore how the real-estate properties within the Tahoe Keys are affected by water levels similarly to predictions from the hedonic models found in Section A.

A. Hedonic Models and the Effect of Environmental Factors, Including Water Levels, on Residential Real-Estate Prices

Hedonic pricing models are statistical models that were created as a more scientific method to monitor the “changes in real estate values” and to determine the “economic factors that cause them.”⁵⁸ “The hedonic valuation process [involves] . . . converting the characteristics of properties into massive data in a collective sense and relating these properties to the (sales) price.”⁵⁹ One such characteristic is the presence or absence of water elements (such as an ocean, lake, stream, etc.) in relation to the property.⁶⁰ However, “it is often difficult to isolate the value of environmental amenities because they are bundled into the price of the entire property along with all of the other hedonic attributes.”⁶¹ To evaluate the value of a single characteristic, such as the presence of water, any discrepancies in price between property located in the same area, with similar non-environmental, and other external factors are attributed to that characteristic.⁶²

In assessing the value of water elements on property, hedonic models have considered several factors, including distance from waterfront, view of water, shoreline length, water clarity, and water levels among others.⁶³ Notably, the distance from waterfront and water levels have substantial effects on waterfront property values due to the effect these characteristics have on the ability of homeowners to dock boats and access the water.⁶⁴ Water levels in particular has been attributed to a property owner’s ability to utilize her property for recreational purposes.⁶⁵ Specifically, the ability to build and maintain a dock

58. Gizem Hayrulloğlu, Yeşim Aliefendioğlu, Harun Tanrivermiş, & Ahmet Cevdet Hayrulloğlu, *Estimation of the Hedonic Valuation Model in Housing Markets: The Case of Cukurambar Region in Cankaya District of Ankara Province*, 7 ECOFORUM J. (2018).

59. *Id.*

60. See Wyman & Worzala, *supra* note 8, at 65.

61. See Kashian & Winden, *supra* note 54.

62. See *id.*

63. See *id.*; Wyman & Worzala, *supra* note 8, at 68.

64. See Wyman & Worzala, *supra* note 8, at 68, 73.

65. See *id.* at 73.

directly off of a property has been shown to increase the value of a property.⁶⁶ For vacant lots, water elements upon which a dock can be built can "result[] in a statistically significant price premium of almost 45%, compared to undockable properties."⁶⁷

This premium, though significant, is common sense to many who have an interest in lakefront property. After all, "a lake's water level is implicitly an attribute associated with [status as] lakefront property" and, therefore, any drop in water level on a lake would restrict the benefits of owning land on the shores of that lake.⁶⁸ This restriction of water access also has a negative impact on property values with homes on them causing real-estate brokers and homeowners alike to project substantial declines in property values if water levels were to drop.⁶⁹ Further, homeowners are up to "three times more likely to put their house on the market if the water levels drop," demonstrating the importance of water levels to the value of lakefront properties and to homeowners on a lake.⁷⁰

Finally, there is also a significant discrepancy between the values of homes that are simply *near* the lake and homes that are *on* the lake. If close enough to the water (within about 2,000 feet) property values will still benefit from a marginal price premium.⁷¹ However, that same property located on the water would benefit from a marginal price premium of more than four times as much as property simply near the water.⁷²

B. *The Effect of Water Levels on Tahoe Keys Residential Real-Estate Prices*

The positive effect caused by being on the waterfront has on property values also holds true for waterfront property on Lake Tahoe.

66. *Id.*

67. *Id.* at 65.

68. See Kashian & Winden, *supra* note 54.

69. See Wyman & Worzala, *supra* note 8 at 76.

70. *Id.* at 68.

71. Node H. Lansford Jr. & Lonnie L. Jones, *Recreational and Aesthetic Value of Water Using Hedonic Price Analysis*, 20 J. AGRIC. & RES. ECON. 341, 349 (1995).

72. *Id.*

Table 1: Tahoe Home Price Comparison⁷³

	Bed-rooms	Bath-rooms	Avg. ft ²	Avg. Price	Cost per ft ²	Average Cost per Bedroom
On Water	4	2.5 +	2,737	\$1,333,333	\$487	\$333,333
Off Water	4	2.5 +	2,407	\$746,491	\$310	\$186,623
On Water	3	2 or 3	1,956	\$1,024,600	\$524	\$341,533
Off Water	3	2 or 3	1,561	\$487,672	\$312	\$162,557

On average, moving a similar single family home with four bedrooms and at least two and a half bathrooms from on the water in the Tahoe Keys to off the water in the same neighborhood drops the total value of the home by 44%.⁷⁴ This could be in part due to the differences in average total square footage between the two categories of property, but the significance of the premium cost for property located on the water is on par with much of the research done on other lakes across the country.⁷⁵ Further, given the history and reputation that Lake Tahoe has, it is reasonable to assume that premiums associated with owning property with access to its waters would be at least equal to those of other lakes.⁷⁶ The increased fame of Lake Tahoe, along with more demand for slightly smaller property than four bedroom homes,⁷⁷ could help explain the almost 53% price premium placed on three bedroom homes located on the water.⁷⁸

73. This Table was created using the data shown in Appendix A, tbls.1–2, *infra*, which provide average property values for homes in the Tahoe Keys and the community of South Tahoe having a waterfront property element.

74. *See supra* Table 1.

75. *See generally supra* Section III.A.

76. *See generally supra* Part III.

77. This demand for smaller homes is possibly due to various factors, such as average family size in the United States being 2.53 people and thus, not needing four bedrooms in the home. Erin Duffin, *Average Number of People per Household in the United States from 1960 to 2018*, STATISTA, <https://www.statista.com/statistics/183648/average-size-of-households-in-the-us/> [<https://perma.cc/L5T4-RMNH>] (last updated Apr. 29, 2019).

78. *See supra* Table 1.

These premiums are also found by observing the price premiums placed on individual properties compared to similar properties located across the street—or lagoon—that do not have direct access to the lake through their property.⁷⁹ For example, a three bedroom home located near the lake with a great view of the lake without direct access to the water was worth \$407.92 per square foot while a similar home with a dockable waterfront was worth \$491.52 per square foot.⁸⁰ Another example of the importance of a dockable waterfront element being present is that the cost of a property located on the water in the Tahoe Keys but in front of water too shallow to be navigable is worth almost 24% less than a similar property just across the water.⁸¹

Any price discrepancy between waterfront property and off-waterfront property only gets more extreme as a property gets farther from the water, even with the mountains present in Tahoe still viewable (another possible reason for high home values in Lake Tahoe). For example, property about a little more than a mile away from the water can be as much as half the price of a waterfront home with the same number of bedrooms and bathrooms while being roughly the same square footage.⁸²

The premiums that are placed on dockable waterfront property in Lake Tahoe demonstrate the losses that would befall homeowners should water levels ever drop to a level that made the Tahoe Keys unnavigable. Even the more conservative differences between dockable waterfront property and non-dockable property are in excess of 20%, even considering non-dockable property still has access to water, just not a dock.⁸³ Still, any further consideration of possible compensation, from a takings claim, for these lost values must be prefaced by an established property right in the water that creates those premium prices that can be taken.⁸⁴

79. *See infra* Appendix A, tbls.1–2 (created using home prices and details found on Zillow.com).

80. *See infra* Appendix A, tbl.1 at rows 4, 18.

81. *See infra* Appendix A, tbl.1 at rows 20, 23.

82. *See infra* Appendix A, tbls.1–2 at rows 21, 48; *see also* Driving Directions from 879 Rainbow Dr, South Lake Tahoe, CA 96150 to 602 Danube Dr, South Lake Tahoe, CA 96150, GOOGLE MAPS, <http://maps.google.com> [<https://perma.cc/SX5Y-LQMW>] (follow “Directions” hyperlink; then search starting point field for “879 Rainbow Dr, South Lake Tahoe, CA 96150” and search destination field for “602 Danube Dr, South Lake Tahoe, CA 96150”) (driving directions from the property in row 48 on Appendix A, tbl.1 to Lake Tahoe).

83. *See infra* Appendix A, tbl.1 at rows 21, 48.

84. NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY § 3.04 (Kevin Anthony Reilly rev. 2019) (1982).

IV. THE COMPETING WATER RIGHTS OF TAHOE HOMEOWNERS AND THE STATE OF CALIFORNIA

Property rights involving the right of individuals to use surface water has historically fallen within two guiding principles: the Riparian Rights Doctrine and the Prior Appropriation Doctrine.⁸⁵ California, however, is one of a few states that uses a Mixed Appropriation–Riparian system.⁸⁶ Under a mixed appropriation-riparian system, a party can establish a water right by either demonstrating that the party is located on the water and, therefore, has a riparian right or by demonstrating that the party has appropriated the water for a beneficial use.⁸⁷ For the purposes of this Comment, the two competing water rights include the rights of the homeowners to use the waters of Lake Tahoe in the Tahoe Keys development and California’s claim to the water due to scarcity of water throughout the state.⁸⁸ Section A will explore the Tahoe Keys homeowners’ possible paths to proving property rights in the water. Section B will discuss the rights of California to divert the waters of Lake Tahoe.

A. The Property Right of the Homeowners Within the Tahoe Keys

California’s mixed appropriation-riparian system is most often traced back to *Lux v. Haggin*, which established that an individual’s claim to the use of water can be established either through ownership of riparian lands (through which the right to use water is granted simply by owning property adjacent to the land) or through the appropriation of said water (through which a right to use water is granted through the diversion of said water for a beneficial use).⁸⁹ So, any property right of the homeowners within the Tahoe Keys dockcommunities to the waters of Lake Tahoe needs to be found within the

85. BARTON H. THOMPSON, JR., JOHN D. LESHY, ROBERT H. ABRAMS, & SANDRA B. ZELLMER, *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 18–20 (6th ed. 2018) (explaining that riparian rights derive from owning land adjacent to water while water rights under prior appropriation doctrine are established through use of the water).

86. *See id.*

87. *Id.*

88. There is also likely a property right claim of the Federal Government due to an invocation of the Public Trust Doctrine or because sections of the land surrounding Lake Tahoe are part of a Federal Land Reserve and National Park. There may also be a federal claim to monitor and control the water flow through the Truckee River Dam (a federal dam); however, the legal effects of any federal government’s action on the water is not the focus of this Comment.

89. *See Lux v. Haggin*, 10 P. 674, 756–57 (Cal. 1886); Eric T. Freyfogle, *Lux v. Haggin and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485, 485 (1986) (discussing the complicated history of the *Lux v. Haggin* case and some of the problematic aspects of the holding).

mixed appropriation-riparian system that has been established in California.⁹⁰ Further, both riparian and prior appropriation water rights in California do not involve ownership of the water, but a right to use the water.⁹¹ Still, homeowners must be able to prove that they are either riparian owners or that they have appropriated the water for a beneficial use to demonstrate that they have a right to use that water and thus have a property right.⁹²

The homeowners' claim as riparians on Lake Tahoe is a possibility—though only a small one—in California. This possibility stems from the homes being located on the water due to the dredging project that created the additional 12 miles of shoreline.⁹³ These dockcommunity homes could be determined to have riparian status if two elements are met: (1) “[t]he lands in question [are] contiguous to or about on the [water source] except in certain cases”⁹⁴ and (2) “[t]he land . . . [is] within the watershed of the [water source].”⁹⁵ Further, the California legislature has determined riparian rights include land that is attached to a stream or watercourse.⁹⁶

To meet the first element, that the lands are contiguous to or about on the water source, the homeowners' lands could be seen as on the water source through the process of dredging and attaching homes within the Tahoe Keys to Lake Tahoe. The Tahoe Keys are also within the watershed of Lake Tahoe, satisfying the second element.⁹⁷ The Tahoe Keys would be part of the Lake Tahoe watershed because all water that falls within the Tahoe Keys would eventually flow to Lake Tahoe due, in part, to its being connected to the main body of the Lake. Further, California courts have held that artificial

90. THOMPSON, LESHY, ABRAMS, & ZELLMER, *supra* note 85, at 20.

91. Kristin L. Martin, *They Can Have My Hose When they Pry It from My Cold, Dead Hands: When California Is Faced with a Drought, Who Gets Water and Who Goes Without?*, 47 TEX. ENVTL. L. J. 57, 64–66 (2017).

92. *Id.*

93. See Chandler, *supra* note 9.

94. *Gonzales v. Arbelbide*, 318 P.2d 746, 748 (Cal. Ct. App. 1957) (citing *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 547 (Cal. 1938)). It should also be noted that the a third criteria element—that the riparian rights only “extends . . . to the smallest tract held under one title in the chain of title leading to the present owner”—has not been included in this Comment because element does not apply to the Tahoe Keys since each tract of land within the Tahoe Keys is (assumedly) held under its own title. *Id.*

95. *Id.*

96. CAL. WATER CODE § 101 (West 2019).

97. *Watersheds and Drainage Basins*, USGS, <https://water.usgs.gov/edu/watershed.html> [<https://perma.cc/ZA3W-P8GT>] (last visited Oct. 6, 2019) (stating that a watershed is the area of land where all of the water that falls in it and drains off of it goes to a common outlet).

watercourses may gain permanent riparian rights if they replace a natural waterway or if “the circumstances under which it originated and by long-continued use and acquiescence by persons interested” in the artificial watercourse leads it to be treated as if riparian rights exist.⁹⁸

It is possible, however, that any riparian claim made by the homeowners would be rejected by a court due to the nature and use of the water canals of the Tahoe Keys. First, the “circumstances under which [an artificial watercourse] originated” referred to in case law almost always involved a watercourse of flowing water such as a stream,⁹⁹ a river¹⁰⁰ or—in pre-*Lux v. Haggins* cases—a diversion.¹⁰¹ In contrast to a watercourse of flowing water, the Tahoe Keys are located adjacent to a lake, and the structure of the canals do not allow much water, if any, to flow in and out. The court could follow the example set by the Michigan Supreme Court in *Thompson v. Enz*, which determined how to treat and categorize the water rights of these artificial canals and the dockcommunities that are located along them.¹⁰²

In *Thompson v. Enz*, the owners of a property located on Gun Lake decided to create a canal system that would increase 1,415 feet of frontage on the lake to “approximately 11,000 feet of frontage on [the] canals.”¹⁰³ The owners argued that already enjoyed “riparian rights . . . can be . . . conveyed in connection with the sale of back lot parcels” abutting the artificial water course that had been created.¹⁰⁴ However, the court, using riparian concepts in accordance with Michigan law, held that to have riparian rights on a lake, the land must abut the natural lake,¹⁰⁵ disallowing the creation and transfer of riparian rights to other property owners through the digging of an artificial canal.¹⁰⁶

98. *Chowchilla Farms, Inc. v. Martin*, 25 P.2d 435, 441–42 (Cal. 1933) (first citing *Hornor v. City of Baxter Springs*, 226 P. 779 (Kan. 1924); then citing *Ellis v. Tone*, 58 Cal. 289, 293 (1881); and then citing *Paige v. Rocky Ford Canal & Irrigation, Co.*, 21 P. 1102, 1105 (Cal. 1889)).

99. *See, e.g., Hornor*, 226 P. at 780.

100. *See, e.g., Paige*, 21 P. at 1102.

101. *See, e.g., Ellis*, 58 Cal. at 292.

102. *Thompson v. Enz*, 154 N.W.2d 473, 474 (Mich. 1967).

103. *Id.* at 474. *Compare* Appendix B (providing a map overview of the dredged inlet on Gun Lake that is at issue in this case), *with* Appendix C (providing a map overview of the Tahoe Keys).

104. *See Thompson*, 154 N.W.2d at 475.

105. *Id.* at 475–76.

106. *Id.* at 475–77 (stating that the creation of new waterfront properties through artificial waterways did not bestow riparian rights upon these new properties).

Due to the similarity of the Tahoe Keys to the project on Gun Lake—and other inland lakes within Michigan and throughout the country—it is likely that any riparian right argument put forth by a homeowner on the Tahoe Keys to establish water rights on Lake Tahoe would be rejected. However, if this line of thinking is used to deny a riparian right, it follows that, similar to *Thompson v. Enz*, the homeowners on the Tahoe Keys will likely be determined to have been granted right of access to the lake via an easement.¹⁰⁷

The lack of a successful claim to establish valid riparian rights could force homeowners in the Tahoe Keys to pursue the right to use water through a prior appropriation. The only requirements to appropriate water and gain right to that water is to “divert[] . . . water from a watercourse and put[] it to a reasonable and beneficial use,”¹⁰⁸ where, a diversion of water occurs through “an alteration from the natural course” of the watercourse and the use must be a beneficial purpose as defined by California law.¹⁰⁹ In addition, to be reasonable, an appropriation and use of water must be more useful to the user than harmful to the other homeowners (and other appropriators) on the watercourse.¹¹⁰

The developers of the Tahoe Keys obviously diverted the waters of Lake Tahoe when they dredged canals inland from the lake.¹¹¹ This diversion was an intentional use of the water in order to create an additional twelve miles of shoreline on a system of canals to provide waterfront property to the homeowners within the canals.¹¹²

The use of water from Lake Tahoe to create canals of the Tahoe Keys is also considered “beneficial” in accordance with California state law.¹¹³ Under 23 CCR § 668, beneficial use includes recreational uses such as “boating, swimming, and fishing” all of which is done either in or from the Tahoe Keys’

107. *Id.* at 476 (stating that because the digging of canals is a legal right connected to riparian lands it is legal for the riparian landowner to also “grant easements in and to the canal to nonriparian property owners”).

108. 62 Cal. Jur. 3d Water § 334 (citing *In re Water of Hallett Creek Stream System*, 749 P.2d 324, 331 (Cal. 1988)).

109. *Id.*; *Diversion*, BLACK’S LAW DICTIONARY (10th ed. 2009).

110. *See* RESTATEMENT (SECOND) OF TORTS § 826 (AM. LAW INST. 1979).

111. *See* Chandler, *supra* note 9.

112. *See id.*

113. CAL. CODE REGS. tit. 23, § 668 (2019).

artificial waterways.¹¹⁴ Further, California law also allows for water to be “appropriated by storage and . . . retained in the reservoir . . . to support these purposes.”¹¹⁵

Finally, the Tahoe Keys’ use of the water from Lake Tahoe in the creation of these artificial waterways was reasonable. Granted, the Tahoe Keys have long been considered by many to be an “environmental disaster.”¹¹⁶ However, the state addressed such environmental impacts when the State of California Regional Water Quality Control Board classified the Tahoe Keys as a “man-modified stream environment zone.”¹¹⁷ Due to this classification, the Tahoe Keys were required to pay a “mitigation fee of \$4,000 . . . for each lot . . . developed” to mitigate such environmental impacts.¹¹⁸

In terms of water use, the Tahoe Keys have had a minimal negative effect on the other users of the Lake Tahoe waters. Due to the massive amount of water held in Lake Tahoe,¹¹⁹ the diversion of enough water to fill a series of relatively small canals does not even minimally lower the water level of Lake Tahoe.¹²⁰ Additionally, the threat of overcrowding the lake due to added users

114. *Id.*; see *Rules for Use of the Channels & Beaches*, TAHOE KEYS PROPERTY OWNERS ASS’N, <https://www.tkpoa.com/documents/category/14-policies?download=148:rules-for-use-of-the-channels> [<https://perma.cc/F6AP-N32J>] (last visited Oct. 26, 2019) (declaring the rules for boats within the Tahoe Keys); see also Mark Scrooby, *Alternative Fishing Spots in South Lake Tahoe*, CHASING KM (July 28, 2017), <http://www.chasingkm.com/2017/07/alternative-fishing-spots-in-south-lake-tahoe/> [<https://perma.cc/MM6C-GDRF>] (stating that the Tahoe Keys are a very good fishing spot for bass, bluegill and even crappie).

115. 23 C.C.R. § 668.

116. See, e.g., Kara Fox, *Eyes on the Keys*, MOONSHINE INK (Nov. 13, 2015), <https://moonshineink.com/tahoe-news/eyes-on-the-keys/> [<https://perma.cc/L8Y3-4J7J>] (discussing the adverse effect that the Tahoe Keys has had in protecting Lake Tahoe from invasive species of aquatic wildlife); see also U.C. DAVIS TAHOE ENVTL. RESEARCH CTR., *Environmental Problems Facing Lake Tahoe*, in *DOCENT MANUAL § IV* at 1–3 (June 2019) <https://tahoe.ucdavis.edu/sites/g/files/dgvnsk4286/files/inline-files/Docent%20Manual%20Chapter%204%20-%20Science%20%26%20Research.pdf> [<https://perma.cc/8KZ4-C7FV>] (explaining the cause of the increase in invasive aquatic species from the Tahoe Keys as well as the negative impact that the allowance of the Tahoe Keys development upon former wetlands has had on water clarity in Lake Tahoe).

117. *Tahoe Keys Prop. Owners’ Assn. v. State Water Res. Control Bd.*, 28 Cal. Rptr. 2d 734, 738 (Ct. App. 1994) (citing Resolution No. 82-8 California Regional Water Quality Control Board-Lahontan Region).

118. *Id.* (stating that the \$4,000 fee was to “achieve a net reduction of nutrients entering Lake Tahoe equivalent to that generated by the Tahoe Keys development”).

119. See U.S. DEP’T OF AGRIC.: FOREST SERV., *supra* note 27 and accompanying text.

120. See Frobish, *supra* note 26.

from this type of project has not been considered harmful to other users of the lake water if public rights to the water exists.¹²¹

This diversion created a right to use the water which was then transferred to the owners of the homes located on the canals through the sale of the land to individuals or is reserved by the original project developer as a common area since it is used by all members of the development project.¹²² Regardless, government action that drains the water of the Tahoe Keys causing harm to the homeowners is actionable because the right to use the water from Lake Tahoe in the Tahoe Keys canals was established and still exists.¹²³

Furthermore, because the right to use the property would be held by either the individual homeowners of the Tahoe Keys or by the homeowners association, it is important to note that for the purposes of this Comment, it will be assumed that the water right was transferred to the homeowner upon purchase of the land.

B. California's Claim to Use the Water from Lake Tahoe

California's legal claim to the water in Lake Tahoe is straightforward and well established. California's legislature has reserved all the water within California to be "property of the people of the State" subject to the right to use as acquired by appropriation of the water "in the manner provided by law."¹²⁴ However, "the people of [California] have a paramount interest in the use of water of [California] and . . . [California] shall determine what water . . . can be converted to public use or controlled for public protection."¹²⁵ Domestic uses of water, such as the use of water in a home for drinking or bathing, are also reserved by the legislature as the highest use of water followed by irrigation purposes.¹²⁶

121. See *Thompson v. Enz*, 154 N.W.2d 473, 477 (Mich. 1967) (stating that the threat of overcrowding of a lake by additional boats from a dockcommunity project is not an issue for a court to rule on if the State Legislature has created a public right to use the waters); see also CAL. WATER CODE § 102 (West 1943) (stating that the waters found in California belong to the people of the state).

122. See *Duckworth v. Watsonville Water & Light Co.*, 110 P. 927, 930 (Cal. 1910) (establishing that a water right transfers along with the transfer of the deed of the property that uses the water).

123. *Glen Oaks Estates Homeowners Ass'n. v. Re/Max Premier Props., Inc.*, 137 Cal. Rptr. 3d 865, 870 (Ct. App. 2012) (citing the Davis-Stirling Common Interest Development Act, CAL. CIV. CODE § 1368.3 (1985)) (stating that homeowners associations have standing in cases that involve damage to the common area of the homeowners association).

124. CAL. WATER CODE § 102.

125. *Id.* § 104.

126. *Id.* § 106.

California's use of the water from Lake Tahoe via the Truckee River was also granted by the federal government through the Truckee-Carson-Pyramid Lake Water Settlement.¹²⁷ This settlement has guaranteed California the right to divert up to "32,000 acre-feet of water" from the Truckee River,¹²⁸ and "23,000 acre-feet per year" from Lake Tahoe.¹²⁹ Further, the agreement regarding the operation of the Truckee Dam is established through a negotiation between the California, Nevada, and the Secretary of the Department of the Interior.¹³⁰ This operation agreement can be altered or changed as long as any changes are negotiated again between California, Nevada, and the Secretary of the Department of the Interior.¹³¹

Given California's established rights to control water distribution, it is likely that any prolonged water shortage could lead California to renegotiate and change the operation agreement of the Truckee Dam to obtain more water for these purposes. This would directly affect the water level of the Tahoe Keys and,¹³² because of the water rights associated with those water levels,¹³³ could lead to legal actions claiming a taking by the government requiring compensation.¹³⁴

C. California and the Public Trust Doctrine

Before any takings claim of the Tahoe Key owners can be analyzed, California's common law public trust doctrine, which hangs over any takings claim involving water rights like a dark cloud, must be addressed.

The public-trust doctrine is the "principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use" of that water.¹³⁵ Every state acquires this "title as trustee to such lands . . . upon its admission to the union."¹³⁶ This responsibility

127. Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3294 (1990).

128. *Id.* § 204(c).

129. *Id.* § 204(b).

130. *Id.* § 205(a).

131. *Id.* § 205(a)(5).

132. *See supra* Part IV.

133. *See supra* Section IV.A.

134. U.S. CONST. amend. V.

135. *Public-Trust Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2009).

136. *Nat'l Audubon Soc'y v. Superior Court of Alpine Cty.*, 658 P.2d 709, 718 (Cal. 1983); *see generally* Russell M. McGlothlin & Scott S. Slater, *No Fictions Required: Assessing the Public Trust*

of the state subjects all water rights of private parties to the rights of the public.¹³⁷ This superior water right of the public allows for states to reclaim water from private parties for a public interest without constituting a taking.¹³⁸ However, a state's exercise of the public trust doctrine can "not be arbitrarily or capriciously impaired."¹³⁹

In California, the public trust has been deemed to "prevent[] any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."¹⁴⁰ Further, the public-trust doctrine has evolved from a "shield" to protect tidelands to extend to protect navigable lakes.¹⁴¹ However, while California maintains the right to continuously supervise and—if necessary—invoke the public trust doctrine on state allowed allocations of water,¹⁴² California "has an affirmative duty to take the public trust in account" when originally allocating the water to the individual.¹⁴³

In accordance with this guiding duty, California "hardly ever invokes the [public trust] doctrine to change established water uses" and instead uses it to constrain "the impacts of proposed new water rights" or "new uses under existing rights."¹⁴⁴ This, however, may be due to previous unsuccessful attempts to use the public trust as a shield for "government regulation of water use from takings challenges."¹⁴⁵ Therefore, though California may be able to invoke the public trust doctrine to divert additional water from Lake Tahoe without the resulting lowered water levels constituting a taking, such an action is unlikely.

Doctrine in Pursuit of Balanced Water Management, 17 U. DENV. WATER L. REV. 53 (2013) (providing an assessment of various state's application of the public trust doctrine).

137. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 445–46 (1892).

138. *Nat'l Audubon Soc'y*, 658 P.2d at 723.

139. *Ill. Cent. R.R. Co.*, 146 U.S. at 446.

140. *Nat'l Audubon Soc'y*, 658 P.2d at 727.

141. *Id.* at 712.

142. *Id.* at 728.

143. *Id.* at 728.

144. Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1105 (2012).

145. *Id.* at 1125 (describing the only three published attempts by the California government to use the public trust doctrine as a defense for governmental restrictions of existing water uses, with only one of the attempts being successful).

V. TAKINGS CONSEQUENCES REGARDING CALIFORNIA'S ACTION OF TAKING
WATER FROM LAKE TAHOE SHOULD THE WITHDRAWAL OF ADDITIONAL
WATER CAUSE WATER LEVELS TO DROP

When the well's dry, we know the worth of water.

— Benjamin Franklin¹⁴⁶

“[N]or shall private property be taken for public use, without just compensation.”¹⁴⁷ The words of the Fifth Amendment, which give rise to the Takings Clause, are clear, even if much of the jurisprudence stemming from those words is convoluted.¹⁴⁸ “[T]he Takings Clause ‘does not prohibit the taking of private property [by the government], but instead places a condition on the exercise of that power.’”¹⁴⁹ This necessary condition to supply compensation following the taking of private property is extended to the actions of states through the Fourteenth Amendment’s Due Process Clause.¹⁵⁰ Takings are split into two basic categories: physical takings and regulatory takings.¹⁵¹ Section A will explore physical takings jurisprudence. Section B will discuss regulatory takings jurisprudence. Section C will explore some of the takings jurisprudence that is more specific to water rights. Finally, Section D will apply the law explored in Sections A–C and assess the possibility of both a physical taking and regulatory taking claim for California’s diversion of water from Lake Tahoe, which would cause the water levels of the Tahoe Keys to substantially drop.

A. Physical Takings

“A physical taking . . . occurs by ‘a direct government appropriation or [a] physical invasion of private property.’”¹⁵² Further, physical takings “involve[] the straightforward application of *per se* rules.”¹⁵³ More specifically, any “permanent physical occupation of an owner’s property authorized by

146. BENJAMIN FRANKLIN, POOR RICHARD’S ALMANACK 59 (1914).

147. U.S. CONST. amend. V.

148. Ingrid Brydolf, *Takings*, 22 ENVTL. L. 1115, 1115 (1992).

149. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 314 (1897)).

150. *See id.* at 536 (referring to *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897)).

151. *See id.* at 538.

152. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288 (Fed. Cir. 2008) (alteration in original) (quoting *Lingle*, 544 U.S. at 537).

153. *Id.* (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003)).

government constitutes a "taking" without regard to the degree of the physical occupation.¹⁵⁴

Physical takings are the "paradigmatic taking,"¹⁵⁵ and often the only form of a taking that lay people are fully aware of. In fact, "until . . . *Pennsylvania Coal Co. v. Mahon*, 'it was generally thought that the Takings Clause reached *only* a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession.'"¹⁵⁶

B. Regulatory Takings Jurisprudence.

Today, regulatory takings are eagerly recognized and are also often split into two basic categories of *per se* takings that involve actual physical takings or invasion of property and regulatory takings that "den[y] an owner [all] economically viable use of his land."¹⁵⁷ However, regulatory takings analysis involving the denial of economically viable use of owned land is far more complicated.¹⁵⁸

Justice Holmes created the idea of regulatory takings in his opinion regarding a bill which prevented a coal company from mining under their property in a particular way, which could put homes on the surface of the mining tunnels in danger.¹⁵⁹ Justice Holmes acknowledged that the government had the power to restrain such mining operations through its police power.¹⁶⁰ Further, it was acknowledged that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹⁶¹ Still, despite these considerations, the Court determined and established that, even through the use of the police power, "if regulation goes too far it will be recognized as a taking."¹⁶²

154. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982) (holding that a taking had occurred when a "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon [the landlord's] property . . . [and a] cable installation occupied portions of [a landlord's] roof and the side of her building").

155. *Casitas Mun. Water Dist.*, 543 F.3d at 1288.

156. *Lingle*, 554 U.S. at 537 (alteration in original) (citing 260 U.S. 393 (1922)); and then citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)).

157. *Casitas Mun. Water Dist.*, 543 F.3d 1276, 1288 (2008); *Lucas*, 505 U.S. at 1016.

158. *Casitas Mun. Water Dist.*, 543 F.3d at 1289 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002)).

159. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

160. *See id.* at 413.

161. *Id.* at 413.

162. *Id.* at 415.

After the ruling in *Pennsylvania Coal*, the Court began to recognize and split regulatory takings into two basic categories; *per se* takings which involves government action that “denies all economically beneficial or productive use of the land,”¹⁶³ and government action that restricts the use of property, which go through a multi-factor inquiry to determine the validity of a takings claim.¹⁶⁴

The first of these, the categorical treatment of regulations as a taking, is appropriate “where regulation denies all economically beneficial or productive use of land.”¹⁶⁵ Such action receives categorical treatment as a taking because the “total deprivation of beneficial use is . . . the equivalent of a physical appropriation” to the landowner.¹⁶⁶ Even if the deprivation is temporary, the deprivation can be compensable under the Takings Clause.¹⁶⁷

However, regulatory takings analysis based upon the deprivation of beneficial use of the land, or some other context outside of *per se* takings is far more complex a process.¹⁶⁸ The Court recognizes that a regulation may go too far if that regulation of private property is “so onerous that its effect is tantamount to a direct appropriation or ouster.”¹⁶⁹ The “polestar” of this form of regulatory takings jurisprudence are “the principles set forth in *Penn Central*.”¹⁷⁰

The Court in *Penn Central* established an assumption that the legislature’s regulation is simply an “adjusting [of] the benefits and burdens of economic life to promote the common good”¹⁷¹ as well as a three-factor test to determine

163. *Lucas*, 505 U.S. at 1015 (citations omitted).

164. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (discussing the courts history of “ad hoc, factual inquiries” that are often used to determine whether a government regulation’s restriction of property use should constitute a taking).

165. *Lucas*, 505 U.S. at 1015 (citations omitted).

166. *Id.* at 1017 (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981)) (stating that while no legal justification for this rule was ever set forth, Justice Brennan suggested “that total deprivation of beneficial use is . . . the equivalent of a physical appropriation”).

167. *Id.* at 1011–12 (explaining the holding from *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304 (1987)).

168. *See Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1289 (Fed. Cir. 2008) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 n.17 (2002)).

169. *Lingle v. Chevron U.S.A. Inc.*, 554 U.S. 528, 537 (2005).

170. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (referring to *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

171. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)) (articulating that without this assumption “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”).

if a taking occurred through regulatory action.¹⁷² These three factors used to determine a regulatory taking include: (1) "the character of the governmental action," (2) the governmental action's "economic impact" on the party, and (3) its "interference with reasonable investment-backed expectations."¹⁷³ This test however, depends largely upon the circumstances of a given case.¹⁷⁴ Courts may also take into account additional factors in determining a taking using the *Penn Central* jurisprudence.¹⁷⁵

In contrast, any permanent physical intrusion by the government provides an exemption to the *Penn Central* factors due to the "unusually serious character" of a permanent physical intrusion.¹⁷⁶ However, while temporary physical invasions, such as government-induced flooding, may also be considered a taking, "'no automatic exemption' from Takings Clause" inspection is given due to a short duration of the flooding.¹⁷⁷ The duration of the temporary physical taking is simply considered a factor during a *Penn Central* analysis.¹⁷⁸

Similarly, in the view of the court, "the answer to the . . . question whether a temporary moratorium" caused by government regulations "effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."¹⁷⁹ The Court refuses to apply *per se* takings

172. Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 615 (2014).

173. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)).

174. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

175. See Eagle, *supra* note 172, at 615–16 (citing *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997)) (in which the California Supreme Court used ten additional factors that applied to this particular case).

176. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

177. Robert H. Thomas, *Recent Developments in Regulatory Takings*, 45 URB. LAW. 769, 771 (2013) (quoting *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012)). The Court stated:

We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemptions from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.

Ark. Game & Fish Comm'n, 568 U.S. at 38.

178. *Id.*; Thomas, *supra* note 177, at 771.

179. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

precedent to most regulatory takings claims.¹⁸⁰ Instead of adopting any set formula for determining a taking caused by regulatory action, the Court engages in “essentially ad hoc, factual inquiries,” examining “a number of factors”—which stem from *Penn Central*.¹⁸¹ However, “[g]overnment regulations that partially destroy the economic use or value of land rarely result in takings” due to the “more rigorous” balancing test under *Penn Central*.¹⁸²

C. Takings Jurisprudence When the Government Takes a Party’s Right to Use Water.

Regarding governmental taking of water rights, “[a] trilogy of Supreme Court cases . . . provides guidance on the demarcation between regulatory and physical takings analysis with respect to these rights.”¹⁸³ All of these cases had taken water rights being considered compensable under physical takings jurisprudence.¹⁸⁴

First, in *International Paper Co. v. United States*, International Paper Company had acquired the legal right to use water from Niagara Falls Power Company via a lease agreement.¹⁸⁵ This right was then withdrawn by Niagara Falls Power Company at the request of the Secretary of War due to the need for additional electrical power output by reasons “of the exigencies and of the national security and defence” caused by World War I.¹⁸⁶ This withdrawal of

180. *Id.* at 323–24 (explaining further that this refusal stems from actions that cause regulatory takings claims often being “ubiquitous [with] most of them impact[ing] property values in some tangential way—often in completely unanticipated ways,” and that “[t]reating [regulatory takings actions] as *per se* takings would transform government regulation into a luxury [that] few governments could afford”).

181. *Id.* at 326 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) and further explaining in footnote 23 that Justice O’Connor named *Penn Central* factors—specifically the interference with investment backed expectations—as the proper way to determine if a regulatory takings goes too far and constitutes a taking).

182. *See, e.g.*, Tyler J. Sniff, *The Waters of Takings Law Should Be Muddy: Why Prospectively Temporary Government-Induced Flooding Could Be a Per Se Taking and the Role for Penn Central Balancing*, 22 FED. CIR. B.J. 53, 57 (2012) (arguing that intentional, temporary flooding caused by the government does not always have to be considered a permanent physical taking and should instead be subject to the *Penn Central* analysis).

183. *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1289 (Fed. Cir. 2008).

184. *See id.* at 1289–90.

185. 282 U.S. 399, 404–05 (1931).

186. *Id.* at 405–06 (the specific instruction from the Secretary of War was in a letter to the Niagara Falls Power Company on December 28, 1917 stated “Please note that the requisition order covers also all of the water capable of being diverted through your intake canal This is intended

a water use right obtained by contract was deemed to be a taking by the government despite the determination that the water was taken "for work deemed more useful than the manufacture of paper," namely supplying power for the war effort.¹⁸⁷

Second, *United States v. Gerlach Live Stock Co.* involved the riparian water rights to natural overflow of a river for irrigation purposes being taken from the land owners by a government dam being built upriver.¹⁸⁸ This natural overflow of the river was uncontrolled, but determined to be relied upon due the overflow's "considerable constancy over the years."¹⁸⁹ The Court determined the government's restriction of relied upon natural water flows was indeed a water right of the riparian property owners, and that the restriction of these natural flows qualified as a taking requiring compensation.¹⁹⁰

Finally, *Dugan v. Rank* involved an intentional diversion of water caused by government operation of the Friant Dam in the San Joaquin Valley.¹⁹¹ This diversion by the dam greatly reduced the flow of water to various landowners downstream from the Friant Dam,¹⁹² despite attempts by the government to adequately correct the issue.¹⁹³ The government's attempt to solve the lowered water flow rates failed and the Court held this diversion of water to have caused a partial taking of the claimed water rights.¹⁹⁴ The damages in this instance were "measured by the difference in market value of the respondents' land before and after the interference or partial taking."¹⁹⁵ Further, the Court determined that "[t]he only way to measure the injury done by an invasion of this right [was] to ascertain the depreciation in market value of the physical

to cut off the water being taken by the International Paper Company and thereby increase your productive capacity . . .").

187. *Id.* at 408.

188. 339 U.S. 725, 730 (1950).

189. *Id.* (stating that "[The] claim of right [was], in other words, to enjoy natural, seasonal fluctuation unhindered, which presupposes a peak flow largely unutilized").

190. *Id.*

191. 372 U.S. 609, 623 (1963) (stating that "[f]rom the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam").

192. *Id.* at 613.

193. *Id.* at 616 (citation omitted) (the attempted solution included building "a series of 10 small dams to be built at the expense of the United States along the stretch of river involved for the purpose of keeping the water at a level 'equivalent' to the natural flow . . . or to simulate [the water flow] at a flow of 2,000 feet per second.").

194. *Id.* at 620.

195. *Id.* at 624–25.

property.”¹⁹⁶ This valuation of the damages incurred by an owner due to a taking has since been extended to easements,¹⁹⁷ which have been determined to be compensable if taken by government action.¹⁹⁸

D. Applying Takings Jurisprudence to the Diversion of the Tahoe Keys’ Water

In determining the applicability of the takings law to the water of the Tahoe Keys, the method which the homeowners used to obtain the property right to use the water is irrelevant. Whether the right to use the water was gained through a riparian right,¹⁹⁹ the appropriation of water for a beneficial use by the homeowners,²⁰⁰ or through an easement right,²⁰¹ if that right is taken away through governmental action, then a taking has occurred and compensation is owed. The question becomes whether any category of takings jurisprudence will provide relief to any homeowners that find themselves without any water elements for their waterfront property. The first sub-section explores the probability of a successful physical takings claim the homeowners within the Tahoe Keys can bring forth while the second sub-section explores the possibility of a successful regulatory takings claim.

1. The Physical Takings Claim of the Tahoe Keys Homeowners

Should California take action to divert more water from Lake Tahoe through the Truckee Dam and deplete all of the water from the Tahoe Keys, it is likely that the determination of a taking by the court will be held as a “physical taking”²⁰² (assuming it could be shown that the lowered water levels in the Tahoe Keys were caused by the additional diversion and subsequent lower water levels within Lake Tahoe).²⁰³

Similarly to the government’s additional diversion of water in *International Paper Co.*, the additional diversion of water for public use by California through the Truckee Dam for public domestic use, or another purpose, will be

196. *Id.* at 625 (quoting *Collier v. Merced Irrigation Dist.*, 2 P.2d 790, 797 (Cal. 1931)).

197. *Cty. Sanitation Dist. v. Watson Land Co.*, 22 Cal. Rptr. 2d 117, 122 (Ct. App. 1993).

198. MILLER STARR REGALIA, MILLER & STARR CALIFORNIA REAL ESTATE § 24:29 (4th ed. 2018).

199. *See supra* Part IV.

200. *See supra* Part IV.

201. *Thompson v. Enz*, 154 N.W.2d 473, 475–77 (Mich. 1967); *see also* Section V.C and text accompanying note 106.

202. *See supra* Section V.A.

203. *See supra* text accompanying notes 22–23.

"deemed more useful"²⁰⁴ by the California legislature than recreational purposes enjoyed by the homeowners.²⁰⁵ Further, even if an additional diversion through the Truckee Dam—or from elsewhere on Lake Tahoe—only partially depletes the water levels of the Tahoe Keys, any takings claim will probably be granted to the homeowners as a partial taking of claimed water rights, which is claimable as physical takings. Therefore, due to the applicability of physical takings jurisprudence to the taken water rights of the homeowners of the Tahoe Keys, any significant reduction in water levels within the Tahoe Keys will likely be deemed a *per se* taking.

2. The Regulatory Takings Claim of the Tahoe Keys Homeowners

There have been commenters who have suggested that intentional-temporary physical takings such as flooding or, in the case of the Tahoe Keys homeowners, the temporary withdrawal of water²⁰⁶ should not be considered physical takings and should instead be subject to the *Penn Central* analysis.²⁰⁷

The first traditional factor of the *Penn Central* analysis, "the character of the governmental action"²⁰⁸ weighs heavily in favor of the diverted water from the Tahoe Keys not being considered a taking. Government action does not establish a taking simply by showing that the landowners have been "deprived . . . of any gainful use," irrespective of the remainder of the owner's land rights.²⁰⁹ The homes in the Tahoe Keys have not been taken, only their right of water use and resulting right to access Lake Tahoe have been taken, leaving most of the land still useable by the owners.

The second traditional factor of the *Penn Central* analysis, "the governmental action's 'economic impact' on the party,"²¹⁰ also weighs in favor of the governmental action not being considered a taking. The diversion of water away from the Tahoe Keys affects real estate prices throughout the Tahoe

204. *Int'l Paper Co. v. United States*, 282 U.S. 399, 408 (1931); see *supra* note 187 and accompanying text.

205. See Scrooby, *supra* note 114 and accompanying text.

206. See *supra* text accompanying note 23.

207. See Sniff, *supra* note 182, at 83 (suggesting that due to the language used by the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), it is implied that "courts should examine further the public benefits and economic impacts of lesser temporary physical invasions to decide whether they are [a taking]").

208. See *supra* text accompanying note 173.

209. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

210. See *supra* text accompanying note 172.

Keys, but this value only affects a homeowner if the homeowner is attempting to sell the home while the water of the Tahoe Keys canals is gone.²¹¹ Otherwise, the real estate prices are simply lower than usual. Further, these prices will most likely return to normal once the government has ceased its temporary additional diversion of water from Lake Tahoe.²¹²

Finally, the third traditional factor of the *Penn Central* analysis, the government action's "interference with reasonable investment-backed expectations,"²¹³ seems to be a wash. The reasonable investment-backed expectations of a lake home purchase is to have access to the lake and be located on the water. However, it is difficult to put a price on limited access to the lake when that limitation is temporary.

Perhaps, instead, the lake home purchase could be seen as an investment opportunity. Still, real estate prices fluctuate regularly,²¹⁴ so a twenty percent value fluctuation of waterfront property due to this government action²¹⁵ is within the realm of reasonable investment-backed expectations.²¹⁶ Therefore, this temporary taking of the water usually located in the Keys by the government action will most likely just be held as a bizarre market fluctuation, not a taking.

VI. CONCLUSION

California is likely to go through a drought in the relatively near future.²¹⁷ When it does, the need for water throughout the state will grow more dire than

211. See David Greene, *Why Real Estate Builds Wealth More Consistently Than Other Asset Classes*, FORBES (Nov. 27, 2018), <https://www.forbes.com/sites/davidgreene/2018/11/27/why-real-estate-builds-wealth-more-consistently-than-other-asset-classes/#431e2a435405> [https://perma.cc/EGR7-B6UZ].

212. See Beckie Strum, *At Lake Tahoe, a High Waterline Means Heightened Sales This Summer*, MANSION GLOBAL (Apr. 21, 2017), <https://www.mansionglobal.com/articles/at-lake-tahoe-a-high-waterline-means-heightened-sales-this-summer-60827> [https://perma.cc/DMZ7-LR63].

213. See *supra* text accompanying note 172.

214. See Greene, *supra* note 211.

215. See *supra* text accompanying note 83.

216. See Les Christie, *Home Prices Post Record 18% Drop*, CNNMONEY.COM (Dec. 30, 2008, 2:06 PM), https://money.cnn.com/2008/12/30/real_estate/October_Case_Shiller/index.htm?postversion=2008123014 [https://perma.cc/QZ2P-5P4D].

217. Paul Rogers, *California's Future: More Big Droughts and Massive Floods, New Study Finds*, MERCURY NEWS (Apr. 23, 2018, 8:00 AM), <https://www.mercurynews.com/2018/04/23/5187547/> [https://perma.cc/46LK-287E] (citing a study

it already is, creating a temptation, for many, to simply “tap Tahoe” to help alleviate the issue.²¹⁸ However, California needs to pause before such action, taking into account each homeowner whose lakefront property will be negatively affected by this action and the money that will likely need to be paid to each homeowner as the result of a takings claim. That claim will most likely be granted in court due to the status of the taking of water rights as a physical taking.²¹⁹ Further, the damages owed to the owners would be measured in terms of lost value of the home due to the decreased water level.²²⁰ This could not matter to California depending on the level of desperation for water and that desperation’s effect on its willingness to pay such damages. Still, homeowners probably will not celebrate a victory on such a takings claim. After all, they had a lake house in Tahoe.

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that found that “extreme weather swings” including droughts “will become the norm over the coming generations”).

218. See Frobish, *supra* note 26; text accompanying notes 47–48.

219. See *supra* Section V.A.

220. See *Dugan v. Rank*, 372 U.S. 609, 624–25 (1963); see also *supra* text accompanying note 195.

* Senior Comment Editor; Marquette Law Review, J.D. 2020, Marquette University Law School; B.A., 2014, Marquette University. I would like to thank those on the Marquette Law Review staff who worked on this comment to prepare it for publication. Thank you also to Professor David Striffling for allowing me to discuss these ideas with you and guiding me in my legal research. A special thank you to Tim Stratz and Charlotte Maya for convincing me that moving to Milwaukee for school would change my life. Finally, to Amber Hornsberger, without whose love and support this would not have been possible—I am forever grateful I needed to print that final paper.

APPENDIX A**

TABLE 1

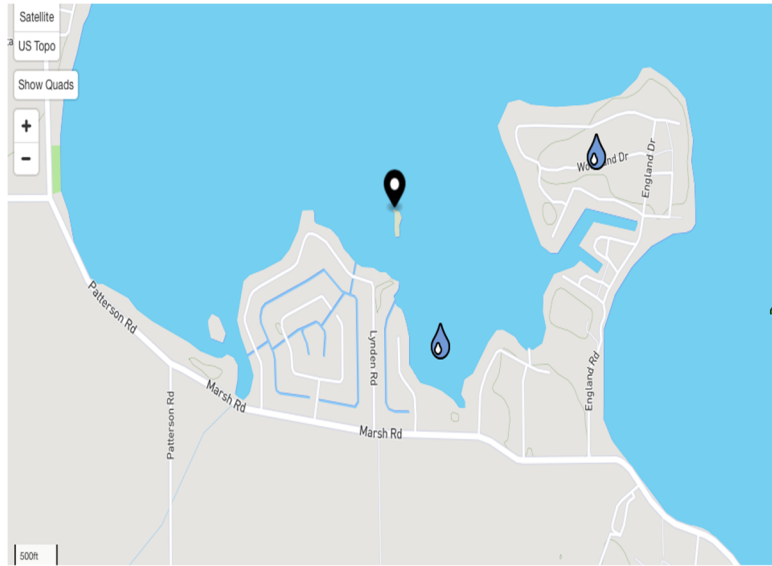
Home Address (South Lake Tahoe, CA 96150)	Bedrooms	Bathrooms	Water Front Access	Square Footage (ft ²)	Price (\$)	Zillow Hyperlink
1716 Venice Drive	4	3	No	2,492	999,000	https://perma.cc/42CN-VXA4
1706 Venice Drive	4	3	No	2,454	799,000	https://perma.cc/4GGZ-ZDPW
1680 Venice Drive	4	2.5	No	2,449	999,000	https://perma.cc/2L9D-V6N6
1665 Venice Drive	4	4	Yes	3,214	1,395,000	https://perma.cc/A3PK-CBEJ
1727 Venice Drive	5	4	Yes	4,337	2,480,000	https://perma.cc/M5SE-NKNP
573 Alpine Drive	4	2	Yes	2,036	869,000	https://perma.cc/J9X2-KP7H
576 Alpine Drive	7	5	Yes	4,865	1,950,000	https://perma.cc/P2LB-GQDC
1909 Cathedral Court	3	2	Yes	1,358	725,000	https://perma.cc/NE36-QUAP
629 Alpine Drive	4	2	Yes	2,184	749,000	https://perma.cc/H7FX-QCMR
2177 15th Street	4	3	No	2,360	725,000	https://perma.cc/BA9E-UB9C
1980 Garmish Court	3	2	Yes	1,600	739,000	https://perma.cc/LQN2-XPJC
2016 Garmish Court	3	3	Yes	1,972	850,000	https://perma.cc/K4DZ-ELQA
2019 Garmish Court	4	3	Yes	2,584	899,000	https://perma.cc/TY4J-N3VB
2015 Marconi Way	4	5	Yes	3,400	135,000	https://perma.cc/R2HC-B42Y
2025 Marconi Way	4	3	Yes	2,422	1,458,000	https://perma.cc/XCY5-DLTH
2030 Marconi Way	5	6	Yes	4,017	2,500,000	https://perma.cc/J8F8-QET6
1996 Aloha Drive	4	2.5	Yes	2,594	1,275,000	https://perma.cc/2REL-J9G6
2007 Aloha Drive	3	3	Yes	2,863	2,600,000	https://perma.cc/D3L7-9896
2042 Aloha Drive	3	3	Yes	2,457	1,099,000	https://perma.cc/CV2A-L5E3
484 Christie Drive	3	2	Yes	2,135	1,049,000	https://perma.cc/U4NZ-5DV2
2072 Traverse Court	4	2	Yes	1,726	699,900	https://perma.cc/225N-FTT4
539 Christie Drive	3	3	Yes	1,612	769,000	https://perma.cc/J84T-AQTA
2071 Venice Drive	3	2	Yes	1,281	374,000	https://perma.cc/KQ95-7CPB
2081 Venice Drive	3	2	Yes	1,343	479,000	https://perma.cc/LN4S-35J6
276 Beach Drive	5	5.5	Yes	3,624	2,750,000	https://perma.cc/8LXU-CLFZ
2246 White Sands Drive	4	2.5	Yes	3,431	1,975,000	https://perma.cc/M4MQ-NY8V
412 Capri Drive	3	3	Yes	2,343	845,000	https://perma.cc/3WLF-3BJV
2254 Balboa Drive	3	4	Yes	1,669	689,000	https://perma.cc/5XWA-VAZY
432 Capri Drive	4	3	Yes	2,238	1,232,533	https://perma.cc/EP36-CZB2
441 Capri Drive	4	3	No	3,208	824,500	https://perma.cc/PQK5-8VVP
2179 Inverness Drive	4	3	Yes	2,678	1,098,800	https://perma.cc/B88L-38FS

** Using Zillow.com, I have created and included Appendix A, tbls.1–2 showing various home prices both on the water within the Tahoe Keys and in the community of South Tahoe, California.

TABLE 2

Home Address (South Lake Tahoe, CA 96150)	Bedrooms	Bathrooms	Water Front Access	Square Footage (ft ²)	Price (\$)	Zillow Hyperlink
2172 Monterey Drive	3	2	Yes	1,709	871,000	https://perma.cc/GD2W-XTCL
2229 Morro Drive	3	2	Yes	1,512	699,000	https://perma.cc/7JLL-QGQ2
2240 Venice Drive	3	2	No	1,612	465,000	https://perma.cc/5NRJ-3AWS
497 Tahoe Keys Blvd	3	3	Yes	1,522	599,000	https://perma.cc/CUB7-3GRX
497 Tahoe Keys Blvd	3	3	Yes	1,521	587,500	https://perma.cc/Q4CL-9MYR
738 Michael Drive	5	2	No	2,273	549,000	https://perma.cc/W9W8-Z9EQ
2281 Arizona Avenue	4	2	No	1,872	484,900	https://perma.cc/KLD6-YZYB
746 Tahoe Keys Blvd	3	2	No	1,312	409,000	https://perma.cc/2ZR3-M86F
768 Michael Drive	3	2	No	1,364	588,000	https://perma.cc/Q4QQ-MWFG
2272 Colorado Avenue	4	3	No	1,847	549,900	https://perma.cc/YX4Y-VCM7
2262 Colorado Avenue	3	2	No	1,254	376,532	https://perma.cc/TBB2-QTH2
2050 Lukins Way	4	3	No	2,168	649,000	https://perma.cc/NE2D-KMW2
590 Eloise Avenue	3	2	No	2,853	899,000	https://perma.cc/B24X-2NEM
813 Tahoe Island Drive	3	2	No	1,075	444,900	https://perma.cc/6KPC-5AGB
2375 Tahoe Vista Drive	3	1	No	864	375,000	https://perma.cc/X8WG-NA64
879 Rainbow Drive	3	2	No	2,236	529,000	https://perma.cc/3ECW-YCDF
915 South Shore Drive	4	3	No	2,028	579,000	https://perma.cc/5WAZ-TGDY
880 Secret Harbor Drive	3	2	No	1,240	444,000	https://perma.cc/586Y-HPMR
760 Eloise Avenue	3	2	No	1,552	425,000	https://perma.cc/3LDS-RYZP
2290 Montana Avenue	3	2	No	1,445	445,000	https://perma.cc/7ZU3-TBF9
2269 Idaho Avenue	3	2	No	1,250	469,000	https://perma.cc/Z6MJ-D3R3
842 Tahoe Keys Blvd	3	4	No	1,783	510,000	https://perma.cc/47TR-KB4Z
2275 Washington Avenues	4	2	No	1,742	479,900	https://perma.cc/2UUN-B55Z
703 Roger Avenue	6	6	No	6,811	2,899,999	https://perma.cc/6NHL-382P
2342 Sky Meadows Court	3	2	No	1,280	299,999	https://perma.cc/973H-AQ43
2306 Sky Meadows Court	3	2	No	1,472	359,000	https://perma.cc/P4F9-CVZD
2281 Eloise Avenue	3	3	No	1,885	525,000	https://perma.cc/5MEN-ZLAX
941 Patricia Lane	4	2.5	No	2,322	699,000	https://perma.cc/RH9C-75R4
714 Tata Lane	3	2	No	1,152	489,000	https://perma.cc/D8JY-ZQS7
656 Tata Lane	3	3	No	2,286	688,000	https://perma.cc/TX4M-85VK
621 Clement Street	4	3	No	2,344	690,000	https://perma.cc/K52S-8DT8
581 Gardner Street	5	3	No	4,028	1,100,000	https://perma.cc/KT6U-6R5U
747 Taylor Way	3	2	No	1,274	435,000	https://perma.cc/FK4J-XPEL
968 Rubicon Trail	4	4	No	2,800	698,000	https://perma.cc/Y4DE-FXQJ

APPENDIX B



APPENDIX C



Tahoe Keys
South Lake Tahoe, CA 96150